# WORKERS' COMPENSATION INDUSTRIAL COUNCIL

# JULY 20, 2011

Minutes of the meeting of the Workers' Compensation Industrial Council held on Wednesday, July 20, 2011, at 1:00 p.m., Offices of the West Virginia Insurance Commissioner, 1124 Smith Street, Room 400, Charleston, West Virginia.

Industrial Council Members Present:
Bill Dean, Chairman
Kent Hartsog, Vice-Chairman
Bill Chambers
James Dissen
Dan Marshall

## 1. Call to Order

Chairman Bill Dean called the meeting to order at 1:00 p.m.

## 2. Approval of Minutes

Chairman Bill Dean: The minutes have been distributed. Is there a motion to approve the minutes as stated?

James Dissen made the motion to approve the minutes from the June 2, 2011 meeting. The motion was seconded by Dan Marshall and passed unanimously.

## 4. Office of Judges Report – Rebecca Roush, Chief Administrative Law Judge

Judge Rebecca Roush: Good afternoon. I would like to say "hello" to my colleagues from the Board of Review and welcome them to the Industrial Council meeting. I have a few items for you to discuss today, and I know you have a full agenda so I'll try to get right to it.

The first item is the Office of Judges report which came to you in this format. We've had to change the format because the Legislative Interim Committee requires it [report] a little differently. It's the same information, just turned this way.

For the month of June we acknowledged 431 protests at the Office of Judges for a total of 2,619 for 2011. Our projected totals for 2011 will be roughly the same as they were last year, maybe 150 to 200 more than last year. For the most part the numbers continue to be the same. We are working on our final decision compliance. Council has requested that we attempt to get all of our decisions done within 60 to 90 days, and we are making an effort. I can say that we're not always entirely successful. As you can see, we had 10.2% greater than 60 to 90 days, which is at roughly 26 decisions. Do you have any questions about the report in and of itself that I might be able to answer?

Chairman Dean: Questions?

Judge Roush: The second thing I wanted to talk about is what's going on from a human resource's perspective within the Office of Judges. We had two retirements in the month of June. Deputy Chief Administrative Law Judge Ann Rodak retired after 41 years of working in the workforce. She retired on Monday. I'll have to say, from my perspective, Judge Rodak was an invaluable member of our Executive Office team and she dedicated most of her career to workers' compensation. She will be sadly missed by me and Judge Drescher. She was just a great lady, a good friend and a good employee. At the end of the month Judge Joseph Mancuso from the Fairmont office will also retire. In the last six months we've been down four administrative law judges. What we intend to do is start the hiring process to replace at least one of those judges.

As you know, we have a decline in the amount of litigation. We don't feel that we need to replace all four of them, but we are going to start looking to hire. We've worked with the Division of Personnel, as well as the Governor's Office, to post an "ALJ II position." That posting actually expired yesterday, so we will begin receiving the applications from the Division of Personnel, and probably in August we will start the interview process. I'll keep you posted on how that is going. There has been a lot of activity in our office over the last few weeks. Does anybody have any questions about that?

Chairman Dean: Mr. Chambers, any questions?

Bill Chambers: No questions.

Chairman Dean: Mr. Dissen?

James Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Kent Hartsog: No.

Chairman Dean: Mr. Marshall?

Dan Marshall: No, Mr. Chairman.

Judge Roush: One more thing. You asked me to share with you some common concerns. You actually asked for some of the Judges to come here to personally speak. And what I've done, as we discussed last month, was come up with some common concerns. We tried to focus on medical treatment because I know that's what the Council has been focusing on over the last few months. And these are the common concerns that they came up with regarding medical treatment protests. Of course, these are not all inclusive. I am sure there are countless other concerns. These are the ones that I could categorize and come up with some common themes. All the appropriate disclaimers should be put forth here. This does not mean that all claims administrators are awful or do erroneous things. But these were some of the common concerns that they had.

The first common concern regarding medical treatment protests related to when a claims administrator finds a claimant at maximum medical improvement. Several Judges found that it is a common practice for claims administrators to deny request of medical treatment for the sole reason that the claimant had been found to be at MMI. A finding of MMI only means that the claimant has recovered from the injury, not that they are no longer going to need medical treatment forever. So, there is a thought that MMI you could still get prolong treatment, such as maintenance treatment or treatment for chronic pain. Just because a claimant is found to be at maximum medical improvement doesn't mean that all treatment cuts off on a foregoing basis forever. That was a common concern.

Number two, with regard to the medical management guidelines – in some claims treatment was denied without reference to the medical necessity of the treatment, or given a reason why it could possibly exceed the treatment guidelines. There does not appear to be consideration given to whether a particular injury is unusual and should be considered for additional treatment outside of the guidelines. We do know that there are cases [exceptional circumstances] where medical treatment beyond the guidelines is appropriate. And I think the agency has been very clear that Rule 20 is a guideline.

On occasion medications that had been approved for long periods of time are denied without the appropriate weaning and tapering period. Often there does not appear to be consideration given to whether a sudden withdrawal from the medication could be detrimental to the claimant's health. Again, this is not all carriers. This is just common themes that we regularly see at the Office of Judges.

Third, we had a lot of complaints related to claims administrator orders themselves. The number one complaint being that the Order denies request of benefits without any explanation at all. Of course here in West Virginia you have to have a reasonable basis to deny benefits. And we see regularly that it just says, "Your request is denied," without any explanation at all. I would have to say that, with regard to these complaints, the common complaints were related to new carriers coming in who may be unfamiliar with the way that we operate here in West Virginia.

The Order denies a request of benefit but fails to include the language advising of the claimant's right to protest. We often see Orders, correspondence, that don't have the claimant's appeal rights listed in the Order.

The claim administrator relies upon older medical reports to deny requested treatment even though the claimant has provided new medical evidence justifying the request. So they are often using stale or old outdated evidence to support their denial rather than something that is more recent.

One Judge noted that in many occupational pneumoconiosis claims the claims administrators are finding them as "non-presumptive," even though prior claims of the same claimant with the same employer were found presumptive. And here in West Virginia if you have a particular amount of time of employment your claim is presumptive. It is presumptively concluded that your occupational disease is related to your employment. There is some concern in the OP area that the claims administrators from outside the state are really unfamiliar with the way we are practicing here.

I just wanted to throw that out there because I wanted to follow-up on Mr. Hartsog's request. This, of course, is just limited to medical treatment. Are there any questions? I'll be happy to answer them.

Chairman Dean: Mr. Chambers?

Mr. Chambers: Judge, I think this is helpful information. You said that this is – if I understood you – that the instances of these issues are significantly more common

among carriers who are relatively new to our market than they are across the population of all carriers who work here.

Judge Roush: Yes, I'd say that. That is absolutely one hundred percent true. In fact, one of the Judges specifically noted – I see we have a BrickStreet representative here – that the BrickStreet Orders are actually phenomenally above and beyond what the other carriers are doing. The claims administrators that practiced here previously are now becoming the standard of what we find to be appropriate. I will say that there are no rules to claims administration. I am sure there are standards used in the industry, but with regard to drafting orders there are no particular set rules or laws in place. . .other than. . .any denial which should be reasonable.

Mr. Chambers: Do you have any sense whether those carriers who are relatively new and who are making more of these errors get better once they've been here a little while?

Judge Roush: It is relatively still new. It is too soon to tell. Hopefully they are. I do know that my office, as well as the Insurance Commissioner's Office, went above and beyond in providing the educational resources necessary to help these carriers understand what is required to be in an Order. I can tell you that I have personally been present at numerous occasions where they've all been told: "You have to include a reason for the denial. You have to include the protest-ability language." So the fact that it is not getting done, I don't know what more they could do from an educational standpoint or what more we could do to get the word out that it is necessary.

Mr. Chambers: So BrickStreet is doing far better. So relatively speaking it puts BrickStreet a little bit of a competitive disadvantage against those who are not following the rules as promptly and as fairly as BrickStreet.

Judge Roush: Well I couldn't just put BrickStreet in that category alone because we do have self-insured employers who also have practiced here, administered claims here for a number of years. And not only that, but I would have to say the claims administrators that manage the Old Fund also are doing a better job in drafting their Orders. So it's not just BrickStreet. It's the people that have been here the longest and are most familiar with the way that we have managed this system in West Virginia.

Mr. Chambers: Thank you.

Chairman Dean: Mr. Dissen, do you have questions?

Mr. Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No. Thank you.

Chairman Dean: Mr. Marshall?

Dan Marshall: Yes. I would like to direct this to Ryan [Sims]. What, if any, authority would this body have to institute any sort of regulations or sanction regimen that might deal with this problem and put a little more pressure on these noncompliant carriers to do this in the correct manner?

Judge Roush: I don't want to interject for Ryan, but I do know that we have the compliance officer for the agency here today, and he has prepared a presentation for you. I will say that we report things that come to us that do need reported to the Compliance Division. We report those to them. Without interjecting, of course Ryan can answer, but I think Andrew Pauley, who is here today, would probably be best able to tell you what the agency can do with regard to how to make certain everybody becomes compliant.

Ryan Sims, Associate Counsel, OIC: My answer would primarily be – like Judge Roush said – I would defer to Andrew Pauley who is doing a presentation today on what we do in our Regulatory Compliance Unit. But I would say there is authority and Andrew can touch upon that. We absolutely have authority over carriers who are not complying with our law when they adjust workers' compensation claims, including not properly wording an Order or putting in an Order what should be. But other than that, I'll defer to Andrew. Maybe he can specifically note that question and address it.

Chairman Dean: Mr. Marshall, any other question?

Mr. Marshall: No, Mr. Chairman.

Judge Roush: Thank you.

Chairman Dean: We'll move onto OIC Employer Enforcement Process. Mr. Kenny, would you like to take care of that?

**4. OIC Employer Enforcement Processes**

**Employer Coverage Unit Areas of Responsibility – Debbie Tincher, Director**

**Revenue Recovery Unit Overview – Tina Clark**

**Legal Enforcement – Employer and General – Andrew Pauley, Associate Counsel, APIR, Attorney Supervisor, Legal Enforcement Compliance**

Bill Kenny, Deputy Commissioner, OIC: Thank you, Mr. Chairman, and good afternoon everybody. We have for you today Directors of three of our different sections of our agency, purpose of which is to inform you of what they do. Hopefully this will be very informative to you. Obviously feel free to ask any questions. We will continue to present to you the various responsibilities that we at the Insurance Commission have, and make available to you other department heads at the forthcoming meetings.

We are going to start with Debbie Tincher, Director of our Employer Coverage Unit Areas of Responsibility. Employer Coverage is pretty much what it says. They make all of the decisions on whether an employer should have coverage, if it's adequate coverage. They issue exemptions for those companies that are exempt from the carriers. Following her will be Tina Clark. Tina is the one that goes after people that owe us or the Fund money – both could be from the old Workers' Compensation Commission. There is still some outstanding debt there, and any new debt – companies that are uninsured. They then have a responsibility for any expenses that are incurred by the Uninsured Fund. Last, from the Legal Enforcement side, Andrew Pauley, who heads up that section of our Legal Department that handles all the regulatory as well as workers' compensation enforcement actions. Unless there are any questions, let's start with Debbie.

**Employer Coverage Unit Areas of Responsibility – Debbie Tincher, Director**

Debbie Tincher: Thank you, Mr. Kenny. Hello everybody. My name is Debbie Tincher and I am the Director of Employer Coverage Unit. I was asked to give a short background on myself. I have a degree in accounting, and pretty much my whole career has been just that – it's been working in financial accounting until I came to the OIC. Prior to coming to the State, I worked for Columbia Natural Resources doing Cash Management. That was my most recent position with the private sector, and I have been with OIC in the capacity I'm currently serving in since January 1, 2006. Previously I was with the Department of Administration preparing the State's financial statements.

I am currently working on the APIR designation, which there are several people here at the OIC that have completed that or are currently working on it.

To tell you a little bit about my unit – our unit has three major functions, and that is workers' compensation compliance. We do the employer exemption reviews and we also screen the uninsured claims. In my PowerPoint presentation I gave you quite a bit of detail. I thought that I should probably give you something to take away so if you had any questions you had a more immediate presentation.

The first issue that we deal with mostly is compliance. We deal a lot with the rogue or the nonparticipating employer. As you know, we assess fines. The OIC has the ability to assess a fine to these employers who do not subscribe to workers' compensation. We have two methods for doing that. One is an automated process. All of the carriers send us electronic submissions through the Proof of Coverage System. Those are identified in our database and they are assessed to "fine" programmatically. Beyond that there are several accounts that do not fall into that category and they have to be set up manually, and those get set up in our unit. We receive referrals for that type of setup from various sources. One primary source is uninsured claim filing. We get referrals from our OIC Regulatory Compliance. We have labor groups and consumer advocates that call in periodically. We also get phone calls from the general public. In addition we also review other "cancels" in the system. Our system cannot take "expireds" [or so forth] and set those up programmatically. So we also review those policies to see if somebody has expired, if they need to maintain their coverage. Our compliance review is very similar to the exemption process, which I'll touch on a little further on. Once we've done our review and we made the determination that "yes" they should be carrying workers' comp and they are subject to a fine, we set the account up. Both automated and manual accounts both are sent a letter [as soon as automated by the system] letting the employer know that they are going to be placed on the "default list," or the potential is there. Then that gives them the process of calling in, resolving the issue or perhaps they shouldn't be on there and they can take care of that. So everybody gets due process. The accounts then proceed to Revenue Recovery for collection purposes.

Some of the additional compliance functions that we do – we verify a lot of insurance certificates. If the carrier has not reported to the Proof of Coverage System timely, then we might get an insurance certificate and we go to the carrier and try to verify that. And these types of accounts get reported also. Anything that is noncompliant that we find in our office with the carriers, we refer to Andrew Pauley's unit. And that can be just failure to report timely. It can be not reporting the effective dates, just a massive amount of errors. We really haven't seen too much of that. We

also do "release notices" to other agencies. And these are done for the Secretary of State or for dissolutions. We do them for the Tax Department and to the Department of Labor for contractors' license when a defaulted employer is collected in Revenue Recovery. They will let us know if everything is in place. We've got their coverage. We send a release to the other agency to let them know that they can now release that license. They are supposed to hold it.

License revocation is the next step. Occasionally they will issue a license and they're on "default." That happens rarely. But for the most part they are not on the Default List when the license is issued, but then they go on the Default List. So we have started a process where we request revocation. And I must say it's been very successful. We notify the Department of Labor or the Tax Department that we need their license revoked because they are in default to the OIC. We've only started doing this fairly recently, within the last year or two, and it has been very successful because general speaking those employers will be knocking on our door pretty quickly to resolve that issue so they can get back to work. It deters the employers but it also aids in our collection efforts.

Our second function is the exemption process. This is an application that appears on our website and the employers can print that off and file for an exemption. This is an extensive application. They fill it out and it comes into to us and we review that application very thoroughly. The first thing we do is check our own systems. If they are in default with us it is automatically rejected and that denial letter is sent. As part of our review, we basically are doing a "desk audit" so to speak because we have access to Tax, Unemployment and other agencies; the Secretary of State. So we can check for the validity of their licenses. We can check to see if they have a default with another agency. If everything is in order, we will issue a Letter of Exemption – a decision is rendered and they get a "Letter of Exemption." And this is good for up to a year or until they hire employees or no longer qualifies. If information is missing, there is an error, they are missing licenses or so forth, we will issue a "denial." It is important to say that the Letter of Exemption is an "opinion" letter, and it is based upon the information that the employer has provided. It does not replace the due process of the user because something can change. That letter is issued, but if they go out and hire somebody it could change three months down the road. So it's important to clarify that.

Our final function is uninsured claims. Our unit is the first intake of the uninsured claim. It comes into us and the very first thing we do. . .it is critical that we review that and determine the coverage status of the named employer in that application. Access to other systems helps us also because we can establish through Unemployment. . .sometimes they are not certain where they work, or they could have a name wrong.

We use other systems to verify employment status as well, and to see if the injured worker is eligible to receive benefits from the Fund. Once that determination is made we staff all of our uninsured claims with our Legal Department, and then they proceed to the TPA or claims management processing.

On the next page there is some statistical data, which I won't read to you. But you can see there the amount of exemptions we received, how many compliance requests we've done, and how many manual accounts we have processed. I have Karen McClure with me today from my unit and she does an outstanding job with compliance, and she works with the uninsured claims. I report to Melinda Kiss. I think we have a great team and we put forth a great effort. I can "toot" my team's horn every now and then so that's what I'm doing.

On the next page you have some contact information. If you have any questions or concerns, you can contact us at that number. I brought business cards. If anyone wants a personal business card to contact me personally, obviously, I didn't put that on there but I'll be happy to give you those after the meeting. Any questions?

Chairman Dean: Mr. Chambers, do you have any questions?

Mr. Chambers: No questions. Good report.

Chairman Dean: Mr. Dissen?

Mr. Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: You deal mostly then with companies that aren't paying their workers' comp and uninsured claims and things of that nature.

Ms. Tincher: Yes.

Mr. Hartsog: You don't really deal with the kind of exceptions that Judge Roush was talking about a little while ago with regard to insurance companies just denying something or a claimant trying to get coverage that he is not entitled to or anything of that nature. That's dealt with in another area as far as the oversight of the TPA's and companies like that.

Ms. Tincher: Right.

Mr. Hartsog: Okay.

Ms. Tincher: We don't get any claims other than the uninsured claims. Once they're on to claims management processing, we are really out of it as far as any protest or any issues that would come at that level. But now if it's a carrier, we hear that stuff periodically but we would just refer that on to Andrew if they had an issue with a carrier.

Mr. Hartsog: Okay. Thank you.

Ms. Tincher: You're welcome.

Chairman Dean: Mr. Marshall, do you have any questions?

Mr. Marshall: No, Mr. Chairman. Thank you for the report.

**Revenue Recovery Unit Overview – Tina Clark, Director**

Tina Clark: My name is Tina Clark. I'm the Director of Revenue Recovery. We are a punitive unit, very small staff of ten plus me. Just a little bit about me. I came to state government in 2007. It was quite an eye opening experience I must say from the private sector where I was a consultant. I did healthcare processes, revenue cycle processes consulting in large markets such as Chicago, northern Virginia and Pittsburgh.

Onto Revenue Recovery. . .as I said we're a small staff, a staff of ten. We have a huge focus. One of the big things is customer service – accuracy and fairness to the employer. We want to make sure that we treat the employer with respect. But we also want to make sure that they come into compliance, they have their workers' compensation policies in effect, and their fines that we assess them are accurate. We deal with employers who are reimbursing the state dollar per dollar for claims that have been filed against them. So if they have gone uninsured and an employee has filed a claim, our TPA [Sedgwick] will assess the claim's reserve and pay out charges to the claims, and we then collect dollar per dollar for that.

As far as our responsibilities, we try to educate the defaulted employer. We explain what could happen to them if their business is uninsured and stays uninsured, and we explain to them about the claims that could be filed against them due to injuries or something worse occurring from their employee.

We collect monies due to the state for the accrued fines and claims charges for the Uninsured Employer Fund (UEF). For fiscal year 2011 our unit collected over a million dollars for the UEF. We also collect Old Fund premiums, sometimes penalty and interest as well. Most of these Old Fund employers are out of business, but there are still times for that collection opportunity to arise. If they want to go back into business we've got them on the default database, so we'll catch them and they will have to satisfy that Old Fund payment. In fiscal year 2011 we collected over a half million dollars for the Old Fund debt.

Onto the next page on "what we do." Our collection activity – we send out several correspondences and also invoices. Once an account is set up into our system, which comes across from Debbie's unit or comes across automatically, the first thing that happens is the Rule 11 Letter goes out to that employer, and I believe Debbie touched on that. This letter advises the employer of the potential placement on the default database. So it is giving them some due process that they can stop this before their business goes on the default database. And just so you know, it's called the "Rule 11 Letter" because it comes from the OIC's Rule 11, which the Industrial Council has approved. The letter also advises the employer of the right to a hearing to determine if coverage is needed.

We also send out an EVS letter. This is one of two. The Rule 11 Letter and the EVS letter are automated, and that advises the employer that the business has defaulted on its workers' compensation obligations. It also explains the revocation process which Debbie also touched on. We also do an "Intent to Lien Letter." That is all manually done in our unit, which advises the employer they have the right to cure before we start placing liens on them or the fines they owe or for the claims reserves. We send out a two-week letter before we start referring to Legal, to Andrew's unit. We also send out monthly invoices which are automated, and they show the monthly "fined" and the total accrued. The fine is calculated at 200% of the premium from the cancelled policy, divided by 12, and that continues to assess at that rate until the employer obtains workers' compensation insurance.

Continuing on with collection activity – telephone contact – we had 21,000 phone calls that came in or were placed out of our unit in fiscal year 2011. For a staff of ten I would say that's a lot of work. We do not have an automated dialer or anything. This is all constant picking up, dialing the phone, or answering the phone calls that are coming in from the employer.

Also we do investigative requests – to post the employer if they are uninsured, and Andrew's unit gets those requests. We also use the investigators to be our eyes and ears, to go out and check on an employer to see if they're still actively working when they shouldn't be. We ask the investigators a lot of questions, and we hope that they get those questions answered from the employer when they come back and report to us. We may request that licenses, permits, certifications, contracts with other state agencies be revoked if the employer remains out of compliance and doesn't have their workers' compensation insurance. This is done through Debbie's unit. We do the request and she further distributes it to the proper agencies that have those licenses revoked. And, yes, that is an excellent aid especially for Lottery and ABC. It bars their lottery license and ABC license. They're going to pay up fairly quickly so they can get their certifications back. We also request that Debbie's unit will release an employer if they become in good standing.

Continuing on with the collection activity. . .in placing the liens, what we typically do is when a fine accrues around the $500.00 mark, we're going to place liens against the employer. It's not only the employer. . .for corporations. . .we're also going to go for the officers and the members too. There is quite a lot of lien processing and releases going on in our unit. We also place liens for the future reserve of a claim which I get from our TPA, Sedgwick. So we have a lien secured for any claims that have been filed. That's what we collect dollar for dollar.

If the employer still refuses to work with us – and there is really not a time limit but as soon as possible – if they continue not to work with us and not getting their workers' comp as they should, we'll request Andrew's unit to file legal proceedings. We go before the Kanawha County Circuit Court. We did one this morning in front of Judge Zakaib. The attorneys will request injunctive relief, monetary judgment for fine owed, and also we would do the same if there is a claim attached to that account. So we would have a monetary judgment as well for the claim reserve.

Account resolution – we have many ways that an employer can pay us. The can send their check in by mail which goes to the Treasurer's Office. The can pay by credit card or check on-line. The can call us and we'll take their payment. They can walk in and we'll take their payment. Just for an example, we do have customer walk-ins. We had over 100 walk-ins in fiscal year 2011. They wanted to discuss their accounts and make sure that they get back into compliance. We also offer payment agreements that can run the span of three years. We have had some that have run their span a little bit longer, especially for claims. With claims being as large as they are sometimes it takes a little bit longer for that employer to be able to pay that back. The employer is charged interest and we set up a payment agreement. We also do terminations. We have found

that an employer will go out of business or just lay off their employees and not let us know, or not let their insurance company know. Therefore their policy is going to ride through to expiration or it will cancel for nonpayment at the next integral of the nonpayment. Sometimes when they don't do that then we have an account that is set up. So we have to do all the research on that to make sure that they truly are out of business so we can resolve that account accordingly. That's quite a long process, but at least it is accurate and fair to the employer if they truly aren't in business.

That pretty much sums up what the Revenue Recovery Unit does. Trending and tracking is somewhat better than when I got here, but we continue to improve that statistical performance. We do send a monthly status report to the Legislature showing what we collect, the liens we place, numbers they want to see.

A little bit of information. . .what we're seeing now is the smaller businesses who are uninsured versus when we first started this. It seems like we had a lot of the bigger businesses that were uninsured or didn't have their policies with the West Virginia endorsement on it. Although I don't have specific trending, we do see that. Lastly, I want to keep West Virginia employers in business and I want them employing our fellow West Virginians. Even though our unit is punitive, we want our employers to work and we want them to be lawful and protect their employees by carrying workers' comp. Thank you for allowing me to present this briefly. It's not a cookie cutter approach. It's a lot of research; a lot of just ongoing looking and reviewing and trying to contact the employer. It could be rough at times. Thank you, again.

Chairman Dean: Mr. Chambers, do you have any questions?

Mr. Chambers: No questions.

Chairman Dean: Mr. Dissen?

Mr. Dissen: No. Very good. Thank you.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No. Thanks. And I wouldn't view your unit as being punitive. What I would view it as is ensuring that there's a level playing field in a competitive environment and somebody's not getting away with doing something and undermining somebody that is living up to their responsibilities.

**Legal Enforcement – Employer and General – Andrew Pauley, Associate Counsel, APIR, Attorney Supervisor, Legal Enforcement Compliance**

Andrew Pauley: Good afternoon. My name is Andrew Pauley and I am pleased to be here on behalf of Acting Commissioner Michael Riley, and our Deputy Commissioner Bill Kenny is here, to speak to you a little bit about regulating workers' compensation in West Virginia. I was in private practice for a number of years practicing law with some small firms. For the last five years I've been here. I came over initially to the Commission to deal with some tort reform, dealing with third party unfair trade practices. Some of you may have heard about that – where we transitioned basically litigation going on in 55 separate counties to the Commissioner's administrative process. The Commissioner at that time, Jane Cline, and Deputy Commissioner Bill Kenny, we built the Compliance Unit up. We put investigators around the state to look into multiple issues. Obviously through that time period we've transitioned into regulating workers' compensation. We also regulate the rest of the insurance industry in assisting compliance enforcement within the unit.

In discussing this presentation with Mary Jane Pickens, our general counsel, I've actually given most of this presentation [this small booklet] at the recent Workers' Compensation Forum. What I've basically done is add the employer pieces that Debbie [Tincher] and Tina [Clark] have spoken about here today. And what I want to do is just give you a little bit about some of the things we do. This is not to be exhaustive. Many of you practitioners out there I'm sure may know about other statutes, and there is some redundancy in Chapter 23 and Chapter 33, which is the insurance Code and Chapter 23 is the workers' compensation Code. What I've tried to do is provide you a little bit of authority. I know there have been some questions about authority – what can you do and how can you do it? I've tried to provide a little bit of authority. Really this presentation is longer than I'm scheduled for today. So I'm going to fly through it and if there are any questions afterwards or at another meeting down the road, I'd be happy to come back or supplement that information to you.

I start out my presentation with the current policy count – 32,457, as of July 12, 2011; about 914 residual market policies. We have about 188 total carriers writing in 79 groups. Self-insured – Angela Shepherd provided me information concerning the active self-insureds – 97 active; 109 inactive with active claims.

General authority, and I am sure Ryan [Sims] could testify to this too. It's been a challenge obviously to carry regular insurance regulation with workers' compensation regulation. We are somewhat a unique state as you know. Most states have – even when they have a privatized system – they have a separate workers' compensation

commission or unit separate from the Insurance Commission. We had a lot of work to combine the two. A brief history there – we have Code which obviously says, "The Commissioner shall enforce the provisions of Chapter 33. . ." And then we had legislation, which upon termination brought the powers of duties to the Insurance Commissioner. And also to tie in with our theme today the next Code section talks about the fact that employers in default were also transferred to the Insurance Commissioner.

Everyone knows about mandatory coverage, enforcement of existing rules. We did some coverage, some legislative changes a couple sections ago to make it clear that administrative fines in Chapters 23 and 33 are the exclusive civil remedies for any violations by private carriers or third party administrators.

What Debbie and Tina talked about today is an important area in our unit. Of course we handle administrative hearings. We handle investigations. We have a Market Conduct Unit that reports to me that deals with looking at systemic problems and issues that we're looking at that we need to take action on. On this particular issue that's been brought up, again, I give you plenty of Code citations and so forth.

I think it's important to note that there is good synergy within the Commission. We get a lot of referrals to Debbie's unit or to me that I'll get back with Debbie on and say, "Hey, is this an issue? Do you know this person?" She does a good checking. She mentioned proof of coverage. We take employer compliance seriously. I know Commissioner Cline did and I know Acting Commissioner Riley does. We want a fair system out there. We want people carrying the coverage. We do not want people going into the Uninsured Fund if we can prevent it. Therefore a lot of times as I stated earlier – and I have map in here – we have investigators around the state that are willing to go out on referrals; notices; if something comes up in the system; a proof of coverage or NCCI notification of cancellation; a competitor may call in and make a referral. We encourage those. People who think someone is operating without insurance, we want those type of referrals. We can send investigators out. Most of the time – on a day's notice or less – we try to get out and get that information back to Employer Coverage and she can set up a "fine account." We get them on the default list. We can go through the Rule 11 process. I'd say a lot of people get into compliance that way. But then we go on down the road and where they won't get involved or they won't get the policy, Tina gets involved. I think Tina's unit does a good job. Again, a lot of issues that get to Tina's unit get worked out before they ever come to the Legal Division. Some of it is just contacting the parties, letting them know their legal responsibilities, and the fact that they need to have coverage. A lot of it has been the transition obviously. When it comes to us we investigate. We have attorneys that

actually go to court. . .enjoin or shut the company down. That's really a last effort. We want companies doing business in the state legally. If we can work with the company and get them in compliance, that's wonderful. As a last ditch effort if we can't, then we may have to enjoin the company and shut them down for doing business in the future. And then of course, as stated, they collect fines. A lot of times it is working out negotiating those fines and other issues. We also do a lot of follow-up investigations – contempt proceedings. Once a company has been shut down by a Judge – sometimes nobody is looking at that – so we go out and we make sure if we stopped them they are no longer working.

A couple of things just to mention briefly. The Uninsured Fund has been mentioned. We have people who monitor bankruptcy to make sure the state doesn't lose anything because of that. I've talked about the collection authority. We have a strong OIG, which is the Office of Inspector General. We do a lot of fraud work. We have the OIG up on the hill and Gary Griffith is our Inspector General. We encourage referrals to them, to us. We work hand in hand. Compliance Enforcement works with them. We'll send them referrals when we think a fraud has occurred. A lot of what Debbie and Tina does – and I know Ryan has worked on a lot of the forms – is to get attestations from some of these people if they are in fact committing a fraud. Some of the form work and leg work that they do initially may help build a fraud claim down the road, and we take that seriously. As I stated, former Commissioner Cline and now Acting Commissioner Riley take that enforcement very seriously.

License coordination is mentioned. I just tried to go in and provide some authority in case you want to go look at some day and read it. Debbie talked about the exemption issues also.

The Employer EVS and collection system. With the claims areas, which I know was discussed earlier and Judge Roush talked about, we believe that carriers are – and this is somewhat a complex issue – basically we have the Unfair Trade Practices Act. Even under the Unfair Trade Practices Act, which is regulating all insurance carriers in the state, there can be an initial claim issue or a failure to timely act which may be an anomaly based on the number of claims that that entity is doing within the state. We take each one seriously, but we're generally looking for systemic problems or patterns where we go in and deal directly with the company on those. Sometimes that takes time to develop that data, such as our examination statute which I'll go into later. We're only required to look at domestic carriers once every five years because sometimes it takes that time period to develop a claims history or a practice. That doesn't mean if there are individual problems that we do not handle them on micro basis, and that means we may be going in and seeking corrective action from these people. This has

been done wrong. What are you doing to fix it? There are different strategies on how you handle it. It's really regulatory discretion. Fines are definitely a possibility there, but it just depends on the situation and circumstances.

EDI reporting – That's required of carriers, self-insured employers to report to the claims database and help provide that information which eventually can be mined for particular problems with laws or failures to report. And of lot of this is about creating data repository so that we can mine, read and analyze the data to determine trends and problems in the future. You can have a simple "fine" strategy where everything that comes in the door gets fined. But if no one is looking at the problem, you are not going determine this systemic problem. You are not going to be able to do anything with that. We try to look at the analysis and the problem – try to correct the problem. We believe we are compliance first. We want to get people on the right road on compliance moving forward. Legally if it continues to occur we go under continual and regulatory response, and escalate it based on the situation and the severity of the problem.

Moving forward, I talked about claims. There is the "failure to timely act." As you know, a failure to timely act is an interlocutory or a side litigation to a main claim. The main claim continues on up the track as it always does with the Office of Judges, Board of Review and so forth. But these issues of failure to timely act can come to us. And, again, we will look at those. We will determine if there is a problem. We'll make sure the company gets contacted. There have been so few of them early on. But I think there is data developing now where issues are starting to come about, where we are starting to see patterns that we may be able to take additional action on, and it's just taking time. It's been a slow process.

Unconscionable Settlement Review – Of course we can look at unconscionable settlements. There are different criteria that we look at on those.

Self-Insured – We don't look at a lot of self-insured entities and self-insured for liability and self-funded ERISA health plans. We have self-insured audit authority, and many of you know we are still working through the self-insured audits and the resolutions from those. Reports are being generated on just the very issues you've asked about – claims, failure to timely act, various handling of issues. We are developing strategies and analysis and actually creating those audits to discuss that with the company to see what the company can do about that and get them in corrective action if there is a problem. And, of course, there is a "fine" structure there in place also for that.

Adjusters had a change to the rule this last legislative session. I mentioned that. I mentioned the Proof of Coverage reporting.

Rates – There is an NCCI Dispute Resolution Process where there is an avenue for people to challenge particular classifications applied to them. We have authority to handle those through NCCI.

Agent issues – Appointments – Agents need to be appointed. It's not a direct right situation. Terminations for cause – those types of things get reported to us because we also do producer enforcement and we have licensure authority over agents and producers, and we handle those issues.

PEOs – We work a lot with those. I know Ron is here from Financial Conditions, and we work a lot with licensing PEOs. We've had issues there. We take that very seriously and want to make sure these companies are licensed and have appropriate coverage on the parties or their client employers. We work very hard on those issues. There are solvency requirements there, and that's kind of new thing for some people from the workers' comp field. They have to have working capital and there has to be protections for the policyholders and the people that are involved in the State of West Virginia.

I mentioned our investigative authority which is quite broad, and the confidential authority of the Commissioner to look into these situations. I put a map in there that breaks down our zones. We have approximately eight investigators with satellite offices around the state that can look into that.

I mentioned Market Conduct, Financial Regulation. Of course we do self-insured financial reviews, and also with self audits to make they are solvent and the ability to do what they say they can do as far as self-insuring in the state. The Commissioner is also involved with the National Association of Insurance Commissioners, which is a national member of all the Insurance Commissioners' territories. We have a lot of collaborative analyses on a nationwide basis about entities, collaborative works, and large compensation carriers in the state. There may be collaborative actions going on that we participate in on a national basis as opposed to within the compounds of the state. I mentioned the self-insured audits and the annual reviews.

Basically we have authority to look at these issues. I just want to leave you with that understanding, that we have ability to investigate on a "micro level" and we have ability to examine on a "macro level" on just about any issue that comes up in compensation – to look at it and do a trend analysis, determine if there are problems

and then go after the particular entity. Make sure they get into compliance. And if need be, "fine" authority, and we have certificate of authority revocation. Obviously if it gets to that with a carrier, we have TPA revocation authority. With self-insureds we have the ability to come before you and talk about self-insured status if it gets to that. Let's hope it never does, but if it does we have that authority.

I put a few numbers in here, some of the postings we do. Postings, as Tina mentioned, we'll go out and post an entity and we'll follow-up on those and make them aware that an entity is not carrying and in noncompliance with workers' compensation. Then we have injunction collection referrals, general referrals. Those can be fairly to timely acts. Those can be compliance referrals from Fraud, the external stakeholders or competitors or other trade industry that feel like there is an issue and make referrals to us on those.

The next to the last page deals with the fact that we really have the one domestic compensation carrier at this point. We did a comprehensive market conduct examination and a comprehensive financial examination on them. We've completed roughly about a third of the self-insured audits of the active entities doing business and we're working through those reports as we speak. We are doing the self-insured annual reviews of all 91 every year, and then fines and restitutions. I put down two resources – Consumer Services Division is our front-line unit that gets a lot of these complaints and tries to direct people to the right area. And even it it's something where they are directing them to the Office of Judges or, for instance, fairly to timely act. As everyone should know by now we have a good resource on our www.wvinsurance.gov page. It has a lot of statutes, codes, information concerning licensure, entities, etc.

Basically we just want to leave you with the understanding. . .we do feel we have broad authority to bring about and enforce and compliance of the workers' compensation code and our duties. It has been a transition and I think everybody has worked hard to get it to where is today. I think some of it is coming through fruition even as we speak. As Judge Roush said, a lot of the new data is coming out, coming to where we can make some trends and analysis and try to determine issues that need to be taken. Of course we do have a transition to our new Acting Commissioner.

Chairman Dean: Any questions Mr. Chambers?

Mr. Chambers: No questions. Thank you.

Chairman Dean: Any questions Mr. Dissen?

Mr. Dissen: No. Those were three excellent reports, and if we do [have any questions] we can always ask you to come back.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: I agree. They were all good. Yours is obviously the broadest and where you actually enforce our rules and market conduct and. . .this is not numbered, but this is the fourth page from the back where it has the stats and kind of looking at what you all have done. If you get reports referred to you with regard to. . .and I've heard consistently for the last year or two years or whatever that there are a number of insurance companies or TPA's that are new to the West Virginia market. As Judge Roush made some points there just a little while ago, the Insurance Commission and the Judges office all try their best to make sure that they are compliant with West Virginia rules. As situations come up where they are not following the rules, so to speak, because of differences in West Virginia versus other states, what triggers your group for looking at them and looking at the market conduct?

Mr. Pauley: That's a good question. I think it is a mining of data. It's a mining of Office of Judges data. It's a mining of Consumer Complaint data. General trends in data that we can obtain or see in the market. Some of it is complaint driven, and so we do encourage complaints if you are having a problem. There is also statistical information that we can research or look into through analysis if we see it. I think to your point and to Judge Roush's point, I think sometimes. . .obviously we've opened the market up in the last couple of years and sometimes unfortunately – this is just from a compliance perspective – sometimes depending on premium volume and volume, there is an issue as to what a particular company spend on compliance in a remote state for instance. We do a lot of complaint analyses and a lot of complaint trending, and we have indexes and we see, for instance, if someone's index has gone up last year dramatically over the past year; if it's gone up in a month dramatically more than it has in the past; or it it's an outlier from all the other entities or like entities. Again, a lot of it is in size, volume, and premium volume, and so forth and it depends. Because, for instance, a large carrier – and I don't want to pick on BrickStreet or anybody like that – but large carriers write a lot. A couple of claims is not going to throw an index off that much because of the number of what they're doing. Now you get a smaller carrier in here and they're not writing that much, then a few claims could throw that thing through the roof immediately. And that's why it's there – to understand, that based on the volume. . .what are you doing here and what is the problem?" The short answer to your question is we have multiple areas and multiple databases, and we have a lot of national data as I mentioned from the National Association of Insurance Commissioners that we can mine. This is complaint data we're seeing in our state. Let's look at other

similar states of our size and let's see what's going on there. It may be relevant. It may not. But we take it all seriously. We don't rule something out even if it is a statistical anomaly. We are going to look into it and get the company into compliance. But whether we escalate that. . .I mean we have to put everything in perspective as to when we start fining companies or taking more drastic measures. We like to hope our actions will get them in corrective action, will get them moving forward. Of course we will monitor that compliance. And some of it is just relativity because they may have had a fairly timely act in January of 2009 and didn't have another one until this summer. Are you going to treat that as two separate occurrences or is that a pattern. You've got to do that analysis and every single situation is different. We don't have a uniformity of determination because we have to have regulatory authority to determine what is a pattern and what is an issue.

Mr. Hartsog: Do you all also look at employee fraud or. . .?

Mr. Pauley: Yes.

Mr. Hartsog: Do you rely on the TPA's and insurance companies to actually look at that and try to. . .

Mr. Pauley: We look at all of it. There is no scope, as far as I know, for either us and civil compliance. But really something like that would probably be escalated to the OIG, and they do not have what I would say any type of cap or confine on the scope to look at. But, again, some of this is complaint driven and we need people to, if they suspect it. . .and there is a duty under our code to report suspected. . .or fraud that you feel has occurred. That is a carrier duty actually. We definitely want that looked at. There is no cap on that and there is no scope confine on that.

Mr. Hartsog: I was a little bit taken aback on this particular page. You are showing that there was one comprehensive market conduct exam done since 2008; that there was one comprehensive financial exam; and there were 28 self-insured audits since 2008.

Mr. Pauley: Right.

Mr. Hartsog: Why the disparity?

Mr. Pauley: We only have one domestic workers' compensation carrier. Our statutory requirements are that we have to look at all of our domestic every five years,

and then of course with the self-insured audits we are working towards getting through those on a yearly basis.

Mr. Hartsog: If one domestic insurance carrier. . .

Mr. Pauley: Writing compensation. . .

Mr. Kenny: BrickStreet is the only domestic we have that writes workers' compensation.

Mr. Hartsog: Well who looks at these other insurance companies that are writing coverage in West Virginia?

Mr. Pauley: That's the next issue. Non-domestic foreign insurance companies writing in this business – we have the authority. We don't do it on a routine basis. We have the authority to go in at any time we find an issue. . .to go in on a targeted exam, and any time we feel there is a problem or an issue. But we have the domestic. . .that's where the NAIC comes in and the national regulation comes in. We have that domestic company looked at in their state, and so there should have been market conduct and financial exams taken care of in their domestic state. We have the authority to get to that information, to review that information. In fact if they are out on an exam we have collaboration ability that we could even ask them, "We're having a particular issue concerning us. Are you seeing this? Can you look into this a little bit?" We have the ability to go across state lines and do collaborative examinations of a large entity such as that. We are a small state, and some of it is resource driven. We don't necessarily do it on a routine basis, but again we are not precluded at any time there is an issue that's brought to our attention that we feel through analysis is a problem that needs to be addressed. We can call an exam and be onsite probably within 60 days if we needed to be.

Mr. Kenny: Maybe the distinction here is "comprehensive" being we do a full blown examination. It is not necessarily complaint driven – although we'll always look at complaints – but we run an audit report on those companies which NAIC developed, and it's uniform throughout the country. So that's what we would call "comprehensive." I think what you are getting to is what we would refer to as "targeted exams." We have a database of complaints, for instance, that looks like we've got a real problem here. We can go in and just look at that particular issue. We could look at the whole thing if we want to but there is no need for us to do that. We'll look at those particular issues. Say the. . .where that carrier is located is going to do a full blown market conduct and/or financial exam, they will put out through the bulletin board, "Hey, we're going to do this,"

and we'll send them questions that we want answered. So it gets done that way. It doesn't get ignored. It's just addressed a little differently than our domestic company. We've got a requirement on our domestic company and since we're an accredited department, when we do an exam that suffices for any other state that BrickStreet for instance would want to do business in. One of things they will do before they let them do business is they will look at the database and say, "Has there been a market conduct exam by West Virginia in this case? How did they fare?" And they will make their state decisions based on that. It's a system of sharing so that 50 states or 56 jurisdictions aren't going in and examining every company. It's a waste of resources for everybody including the companies.

Mr. Hartsog: I understand. Mr. Chairman, that's an area that I have heard routinely over the last couple of years. It has been the smaller carriers that aren't here that are having trouble adapting or getting into our policies or whatever. It is something perhaps – not today – but perhaps get on the next agenda. . .to get into a little bit more about exactly how that works and make it a little bit more easier that an accountant sitting here could understand the process a little bit. And look at targeted exams and what they've been and kind of what the results have been. Get a little bit more in that particular area if that's okay, especially since it's gotten a lot of attention from the OIC bringing up issues in that regard as well as individuals that have talked about that. And maybe talk a little bit about your efforts with regard to claimants and how much of that has come up in pursuing false claims and things of that nature, if that would be all right.

Chairman Dean: Is that something we could look at Bill?

Mr. Kenny: Yes. I think what you're looking for is obviously a presentation that we have planned for the future from our Criminal Fraud Unit. Frankly they have found fraud on every level – provider, employer and employee – and how they approach it. They have some police powers. They have three State Troopers that are assigned to us. We use their powers that we don't have, and they can go through that process with you. And I think Andrew mentioned the carrier responsibility that, according to law, if they even suspect fraud it needs to be reported to us. We get a lot of referrals there.

Mr. Hartsog: Someone getting cut off after they have reached MMI from further treatment isn't necessarily what I'd consider criminal or fraudulent or anything. I consider that typically a mistake. That was more of the kind of things that I have been hearing routinely that are and have been kind of an issue. Looking more at how many of those have been addressed and how many targeted, like you've seen as far as some of the stats and stuff. Or help us understand that area a little bit better and see if there is anything that we need to be looking at and doing in that regard.

Mr. Pauley: I agree with Bill [Kenney]. That's probably your Office of Inspector General. If they are going to speak on that I'm sure they could get you some stats and some info.

Mr. Hartsog: But I thought your office handled targeted. . .

Mr. Pauley: Oh, targeted exams on. . .

Mr. Hartsog: Yes. On specific insurance companies. . .

Mr. Pauley: If there are any. . .I'll be honest with you, if there have been any I think we could get you that information.

Mr. Hartsog: If you could and let's maybe talk about it at the next meeting.

Mr. Kenny: I am getting a mixed message here. Are you talking about employee or employer?

Mr. Hartsog: I am probably confused too, Bill.

Mr. Kenny: Employee or Employer?

Mr. Hartsog: I was actually referring a little bit to both in seeing what's going on in those areas, and perhaps more of the criminal investigative side that you were referring to. It may be the place to address the employee side. On the employer side I would just like it a little more targeted with regard to issues that you have seen with regard to companies or TPA's that may not be quite as familiar with our market and what's happened in that regard.

Mr. Kenny: And I've got to say – and I'm going to try to help develop some statistics that prove what I'm about to say – it is our belief that that has gotten better. That it has been an educational issue. We have now had two annual sessions and they have both been very well attended, over 200 people at each one – companies coming in and going through a process; Andrew going through this. Each one to educate and it has gotten better. What we are finding a lot now from what I'm hearing is that it is more of a standard individual adjustor as opposed to a company policy. Most of the companies have been contacted enough and said, "We'd better change this." And it was an ignorance issue in my view. Not an issue of fraudulently trying to get around something. It's now down to that individual adjustor area and that's something

companies have to deal with. It would difficult for us to deal with it at that level, but we certainly notify the companies of it. How many targeted exams have we looked at? Market Conduct looked at?

Mr. Pauley: I don't think there has been any that I can think of. I would have to look at it. I'm not sure. . .

Mr. Kenney: Back up to the process. . .I don't think you went through of what happens when you get a referral from the Office of Judges [or anybody], and what we do to determine what the next step is because this is all a measured approach.

Mr. Pauley: Right. I think generally – and I was going to mention that about fraud too – we have a Chinese wall between us. A lot of the information we do not challenge, and obviously they have confidentiality. We have confidentiality statutes that deal with while we are investigating something. When we are looking at something and it is in an analytical standpoint and we're building a data issue or a trend issue, that information is not going to be released. I don't think you can read anything to it. I mean, obviously, the Commissioner speaks through his orders. If we take an enforcement position we enter an Order. If we finish an examination report we will issue an Order with the report. If we finish the self-insured audit we'll issue that, and we've got to work on what we are going to disclose on that. So there are a lot of confidentiality issues that we're subject to by statute. I mentioned them in the presentation. As far as getting you statistics that shouldn't be a problem.

Mr. Hartsog: That's all I'm asking for is the number of targeted audits that you've looked at in the last three years, since 2008, and kind of what in general your findings and observations have been as a result of that.

Mr. Pauley: Sure. Not a problem.

Chairman Dean: Mr. Marshall, do you have any questions?

Mr. Marshall: No, Mr. Chairman. I appreciate your presentation.

## 5. Board of Review Presentation – Stays Pending Appeal, Judge James D. Gray

Judge James D. Gray: I am Jim Gray, one of the members of the Board of Review. I would like to introduce Judge Jack Stevens here today, a very experienced

Judge both in the Circuit Court and the Board of Review, and our Senior Staff Counsel, Beth Suter.

I am here briefly to describe what we do, and also to tender and file a memorandum that the Board prepared on July 7, 2011, in response to a question to a concern raised at the Industrial Council's last meeting.

Our panel of three Judges reviews appeals, some from Judge Roush's section, and we will affirm or deny, or affirm or reverse, modify or remand. It's much like the Intermediate Court of Appeals in workers' compensation cases. That's the long and short of it. The issue raised at the last meeting by a claimant's lawyer involved a "Stay." It was referenced at least that there was no rule or standard by which Stays were granted or denied. So wanted to clarify for the Council what we do and what standards we do use. There is no written rule either here or at the Office of Judges that we know of. So this memorandum sets forth briefly our authority and the things we consider criteria, which basically is a "balancing of equities." It's sort of like an action for preliminary injunction or other extraordinary remedy. And we will waive the equities; consider the relative harm or prejudice to the parties; the likelihood of success on appeal. We also presume that no appeal is filed frivolously. Those are basically the considerations that we use.

Specifically with regard to the concern expressed about Stay of temporary total disability benefits following injury, we have reviewed the numbers and have provided those the Industrial Council. From January 1, 2008 through June 28 of this year there were 5,982 appeals filed before us. There were 542 Motions for Stay, which is about 9%. Of the Petitions requesting a Stay of TTD only, 39 were granted in that timeframe.

We are particularly sensitive about TTD Stays for employees who are injured and are in the recovery process. They obviously need their wage replacement benefits if they get them. So it is a very rare occasion where we would Stay a TTD award for someone who is not working due to the injury. The Stays that are granted of TTD typically involve litigation over how long the period should have been after the employee . . .maybe granted an award or relates to return-to-work. So that's what most of those issues do involve.

There was some comment about whether or not a Procedural Rule might be advisable or necessary. The Board does not really believe a rule is necessary. We think the number of Stays relative to the number of appeals is small. However, we don't have an objection to a rule if one were proposed by the OIC. We would like our discretion to be preserved. We think that any such rule would have to involve the same

balancing act; a consideration of equities that we already use. We want to be sure that we are fair to all parties concerned, and that any such rule procedure would not be utilized as an effort to tilt the playing field one way or another through comments or other mechanisms.

I appreciate this opportunity. Our Chairperson, Rita Hedrick-Helmick, sends her regrets. She was called out of town on a family matter and couldn't be here today. We're open to questions that you might have.

Chairman Dean: Mr. Chambers, any questions?

Mr. Chambers: A couple of questions and a comment. I've known Judge Stevens for many years and have great respect for him. So I'm comforted just by the fact that he is part of your group. On the number of Stays, 542 Motions for Stay. How many of those were granted? I know a little more than half of the TTD Stays were granted.

Judge Gray: When you look at Stays which were granted on a limited basis, maybe they're granted in part and denied in part. Roughly. . .I'll check on that. . .but the percentages are roughly equivalent. Of course now with the number of appeals being substantially less than they were in 2008, so is the number of Motions for Stay, substantially less. It is running pretty much in the same parameter.

Mr. Chambers: These are statistics from 2008 to 2011. Attorney Sue Howard, I believe it was who came to our last meeting, said it's her perception that the number of Stays being granted for TTD has increased recently. How do these statistics break down by year? Or do you see any trend there where that percentage has changed much over this time period?

Judge Gray: We have looked at that in response to that concern. On average it was about 9% over that time period. We have seen in the last year a small uptick on a percentage basis. Part of that I think is just simple math because the numbers are so much lower, but not much change will change the percentage. Having said that, the number of Stays is probably increasing a bit by percentage.

Mr. Chambers: Thank you.

Chairman Dean: Mr. Dissen, do you have questions?

Mr. Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No questions. Thank you very much.

Judge Gray: Thanks for the opportunity.

Mr. Marshall: Did I understand you correctly that if a Motion for Stay is made there is a presumption on the part of the Judges in favor of the appellant?

Judge Gray: The presumption is that no pleading is filed which is frivolous or [inaudible]. We accept the. . .not the substantive risk, but the fact that it's filed in good faith, in a good faith effort seeking a Stay for good cause shown.

Mr. Marshall: But it's a level playing field as you consider it between the two parties?

Judge Gray: We try our best to maintain that level. Quite frankly we are attacked this way by Claimant's Bar and attacked that way by. . .We try to maintain a level playing field.

Chairman Dean: Anything else?

Mr. Marshall: No, Mr. Chairman.

Judge Gray: Thank you, again, for the opportunity.

Mr. Kenny: Mr. Chairman, perhaps it might be helpful for your discussion for Ryan to go through the law change that was made. . .to give you some historical background, and it will take just a minutes if it's all right.

Ryan Sims: Just to give you some background on how this area of procedural law developed in the Workers' Compensation Office of Judges and Board of Review realm. When we privatized there was a rule change made by our predecessor, the Workers' Compensation Commission at some point, and I don't know when. I think it was in Rule 1. And if I recall it essentially – and you might be able to help me on this Becky [Roush] – but I think it essentially granted a Stay of Right from the Office of Judges to the Board of Review on some issues.

Judge Gray: That's right, in 2005.

Mr. Sims: There was some debate between the claimant's bar and the defense bar as to whether that rule – which again was promulgated by the Workers' Compensation Commission and approved by your predecessor, the Workers' Compensation Board of Managers – as to whether or not that might conflict with statutory law. It seems to me around 2007. . .help me with the dates if you could. But it seems like around 2007 we did two things to address that. We felt it did need to be addressed. And that sort of a Stay of Right going up to the next level on any issues wasn't really equitable to claimants so we changed the statute. The statute I believe was changed to clarify when Stays are appropriate and when they aren't. We ran a Bill and it got through. And then concurrent with that we changed the provision in Rule 1 to the current Rule 1 provision. It's essentially a discretionary Stay Upon Request, either at the Office of Judges level or at the Board of Review level. Generally with Stays you defer to the adjudicatory body and they apply equitable methods to decide when to grant a Stay. That is usually something, just like a continuance. Normally that is not something that you set forth standards and rules about. Usually there are equitable standards. At least in OIC's opinion we think the Board of Review has set forth equitable standards that they are consistently applying.

Mr. Hartsog: Ryan, I don't think. . .maybe I'm speaking out of turn here, but I don't think it was our intent to look at a rule or do anything like that. My intent is just to understand the process better and how things happen at different levels and what goes on.

Mr. Kenny: Which is why I wanted him to clarify. . .

Mr. Sims: He just wanted me to give you the background on how this sort of evolved.

Mr. Chambers: Will somebody forward some of this information to Attorney Howard who appeared here last time and inform her? I think it would be enlightening for her to read.

Mr. Kenny: We will certainly do that.

Mr. Dissen: That was my concern. When we ask for public comment and we get it, we don't want to ignore it.

Mr. Kenny: Right.

## 6. General Public Comments

Chairman Dean: We'll move onto general public comments. I see no one signed up to speak. Would anybody from the general public like to speak today?

## 7. Old Business

Chairman Dean: Does anybody from the Industrial Council have anything they would like to bring up under old business? Mr. Chambers?

Mr. Chambers: No, sir.

Chairman Dean: Mr. Dissen?

Mr. Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No, sir.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No, Mr. Chairman.

Chairman Dean: Very good. We'll move onto new business.

## 8. New Business

Chairman Dean: Does anybody from the Industrial Council have anything they would like to bring up under new business? Mr. Chambers?

Mr. Chambers: No, sir.

Chairman Dean: Mr. Dissen?

Mr. Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No, sir.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No, Mr. Chairman.

## 9. Next Meeting

Chairman Dean: The next meeting will be Thursday, August 25, 2011, at 1:00 p.m. Is that good with the Industrial Council? Very good.

## 10. Executive Session – Self-Insured Annual Renewals

Chairman Dean: The next order of business is Executive Session. The next item on the agenda is related to self-insured employers. These matters involve discussion as specific confidential information regarding a self-insured employer that would be exempted from disclosure under the West Virginia Freedom of Information Act pursuant to West Virginia Code §23-1-4(b). Therefore it is appropriate that the discussion take place in Executive Session under the provisions of West Virginia Code §6-9A-4. If there is any action taken regarding these specific matters for an employer this will be done upon reconvening of the public session. Is there a motion to go into Executive Session?

Mr. Dissen: So made, Mr. Chairman.

Chairman Dean: There is a motion. Is there a second?

Mr. Marshall: Second.

Chairman Dean: A motion has been made and seconded to go into Executive Session. Any questions on the motion? All in favor signify by saying "aye." Opposed, "nay." The aye's have it. We will now go into Executive Session.

[The Executive Session began at 2:30 p.m. and ended at 3:01 p.m.]

Chairman Dean: We are back in regular session. The Resolution is to approve the following self-insured companies that are recommended for renewal of self-insured status, and they are:

City of Huntington
Federal Express Corporation
FedEx Freight, Inc.
FedEx Ground Package System, Inc.
FedEx Smartpost, Inc.

Chairman Dean: Is there a motion for renewal?

Mr. Marshall: So made.

Mr. Dissen: Second.

Chairman Dean: A motion has been made and seconded for renewal of self-insured status for these five companies. Any question on the motion? All in favor signify by saying "aye." Opposed, "nay." The aye's have it. [Motion passes.]

## 11. Adjourn

Chairman Dean: Seeing no other business, is there a motion for adjournment?

Mr. Dissen made the motion to adjourn the meeting. The motion was seconded by Mr. Marshall and passed unanimously.

There being no further business the meeting adjourned at 3:05 p.m.